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No. _____

IN THE

Supreme Court of the United States

NEW YORK CITY HOUSING AUTHORITY,

Petitioner,

—v.—

PAULINE DAVIS; CYNTHIA WILLIAMS; CORNELIA SIMMONS; KIM RIVERA, on behalf of themselves and all others similarly situated,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEVEN J. RAPPAPORT
Counsel of Record
RICARDO ELIAS MORALES
General Counsel
New York City Housing Authority
250 Broadway, 9th Floor
New York, New York 10007
(212) 776-5152

Counsel for Petitioner

Of Counsel:

NANCY M. HARNETT

320YR

QUESTIONS PRESENTED

1. Can a federal court impose a racial quota for white families at public housing developments to permanently bar an admission preference for working families, which is endorsed by Congress and the Executive branch to promote social stability, by invoking a consent decree that provides remedial relief to individuals, but prohibits quotas and does not require the number of white families to decline?

2. Can a public housing authority's admission preference for working families be permanently enjoined as perpetuating segregation in violation of the Fair Housing Act based on statistically insignificant data?

LIST OF PARTIES

The petitioner is the New York City Housing Authority ("NYCHA").

Respondents ("plaintiffs" or "*Davis* plaintiffs") are Pauline Davis, Cynthia Williams, Blanca Iris Hernandez, Gina Campbell, Jeanette Vargas, Cornelia Simmons, and Kim Rivera on behalf of themselves and a class comprised of all Black and Hispanic applicants who applied for public housing during a certain period as specified in the consent decree among NYCHA, plaintiffs, and the United States of America ("Decree").

The United States is the plaintiff in an action that was consolidated with the *Davis* plaintiffs' action. The United States, however, did not oppose NYCHA's admission preference for working families. Nevertheless, NYCHA has served the Solicitor General with this petition as well as the Office of the United States Attorney that has represented the United States in this litigation.

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PETITION FOR WRIT OF CERTIORARI

NYCHA respectfully petitions this Court to issue a writ of certiorari to review the January 3, 2002 decision of the United States Court of Appeals for the Second Circuit that affirmed in part and reversed in part the August 11, 1999 order of the United States District Court for the Southern District of New York. The District Court granted the *Davis* plaintiffs' motion to permanently enjoin NYCHA from implementing an admission preference for working families ("WFP") at any public housing development where white families constitute more than 30% of the tenant population ("Developments"). Over the Chief Judge's dissent, the Second Circuit affirmed the injunction with respect to 14 of the Developments and reversed the injunction with respect to the remaining six. The Chief Judge disagreed with the majority's rejection of NYCHA's position in favor of the WFP.

OPINIONS AND ORDERS BELOW

The District Court's December 30, 1992 decision approving the Decree is reported at 1992 U.S. Dist. LEXIS 19965 (S.D.N.Y. Dec. 30, 1992), and appears at pages 174a-84a of the Appendix to this Petition ("*Davis I*"). The District Court's July 17, 1997 decision preliminarily enjoining NYCHA from implementing the WFP at all NYCHA developments and denying an injunction against another modification to NYCHA's admission procedures is reported at 1997 U.S. Dist. LEXIS 10451 (S.D.N.Y. July 17, 1997) (137a-73a) ("*Davis II*"). The District Court's November 13, 1997 decision denying NYCHA's motion for reconsideration and reargument, but modifying the preliminary injunction to permit NYCHA to implement the WFP at any

development where white families do not constitute more than 30% of the families at the development, is reported at 1997 U.S. Dist. LEXIS 18111 (S.D.N.Y. Nov. 13, 1997) (123a-34a) ("*Davis III*"). The District Court's November 18, 1997 order amending its November 13, 1997 order is unreported and appears at pages 135a-36a of the Appendix ("*Davis IV*"). The Second Circuit's January 22, 1999 opinion vacating the District Court's decisions, but leaving the preliminary injunction intact pending remand for more specific factual findings and application of the proper legal standard, is reported at 166 F.3d 432 (2d Cir. 1999) (110a-22a) ("*Davis V*"). The District Court's August 11, 1999 order on remand denying NYCHA's motion to lift the preliminary injunction against the WFP and granting the *Davis* plaintiffs' motion to make the preliminary injunction permanent is reported at 60 F. Supp. 2d 220 (S.D.N.Y. 1999) (67a-109a) ("*Davis VI*"). The Second Circuit's February 23, 2000 summary order remanding to the District Court for a second time for supplementation of the record is reported at 2000 U.S. App. LEXIS 2746 (2d Cir. Feb. 23, 2000) (62a-66a) ("*Davis VII*"). The District Court's June 20, 2000 decision supplementing the record is reported at 103 F. Supp. 2d 228 (S.D.N.Y. 2000) (51a-61a) ("*Davis VIII*"). The Second Circuit's January 3, 2002 decision affirming in part and reversing in part the District Court's August 11, 1999 order is reported at 278 F.3d 64 (2d Cir. 2002) (1a-50a) ("*Davis IX*").

JURISDICTION

NYCHA invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The Second Circuit's January 3, 2002 decision was entered on that date.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This petition involves the following provisions, which appear in the Appendix where indicated below: Equal Protection Clause of the Fourteenth Amendment to the United States Constitution (265a); and excerpts from 42 U.S.C § 1437 (269a); 42 U.S.C. § 1437a (269a); 42 U.S.C. § 1437d (266a); 42 U.S.C. § 1437n (266a, 270a); Pub. L. No. 104-99, § 402(d)(1), 110 Stat. 26, 41 (1996) (267a); Pub. L. No. 105-276, §§ 502(a)(3), 502(a)(5)(C), and 502(a)(5)(D), 112 Stat. 2518, 2520-21 (1998) (267a-68a); 42 U.S.C. § 3604(a) (271a); 24 C.F.R. § 960.205(a) (272a); 24 C.F.R. § 960.206(b)(2) (272a-73a); 24 C.F.R. § 960.211 (272a); and 24 C.F.R. § 913.104(a) (272a).

STATEMENT OF THE CASE

The *Davis* plaintiffs claimed that NYCHA discriminated against Blacks and Hispanics in selecting and assigning public housing tenants. The claims were settled pursuant to the Decree which provided remedial relief to up to 1,990 individuals and required NYCHA to implement a Tenant Selection and Assignment Plan ("TSAP"). In 1995, NYCHA proposed to modify its TSAP by adding an admission preference for working families, now known as the WFP. Although Congress required housing authorities to promote economic diversity in their developments and the United States Department of Housing and Urban Development ("HUD") explicitly endorsed a preference for working families to achieve that goal, the *Davis* plaintiffs moved to enjoin the WFP as racially discriminatory. The District Court rejected their argument that the WFP would have a disparate impact on minorities, but permanently enjoined

the WFP at housing developments more than 30% white on the ground that it would violate the Decree by perpetuating segregation. The Decree, however, prohibits racial quotas, does not define any development as segregated, and does not require that the white population decline. Nevertheless, the Second Circuit affirmed the injunction at certain of the Developments, even after acknowledging that the projected difference in the number of white families under the TSAP and with the WFP was not statistically significant. In dissent, Chief Judge John M. Walker, Jr. expressed concern that the 30% racial quota was arbitrary and that the majority had endorsed a questionable attempt at social engineering.

1. Federal Policy

Public housing experts agree that income mix is essential to public housing's social and financial stability. Federal law in effect when NYCHA first proposed the WFP required all housing authorities "to the maximum extent feasible . . . [t]o include families with a broad range of incomes and [to] avoid concentrations of low-income and deprived families with serious social problems." 42 U.S.C. § 1437d(c)(4)(A)(iv), *repealed*, Balanced Budget Downpayment Act, I, Pub. L. No. 104-99, § 402(d)(1), 110 Stat. 26, 41 (1996) (266a).

More recently, Congress announced that "the public housing system is plagued by a series of problems, including the concentration of very poor people in very poor neighborhoods and disincentives for economic self-sufficiency" and that "the interests of low-income persons, and the public interest, will best be served by a reformed public housing program that . . . rewards employment and economic self-sufficiency of public housing residents." Pub. L. No. 105-276, § 502(a)(3), 112 Stat. 2518, 2520-21 (1998) (267a-68a). Congress prohibited public housing authorities from "concentrat-

[ing] very low-income families (or other families with relatively low incomes) in public housing dwelling units in certain public housing projects or certain buildings within projects" and required authorities to adopt deconcentration plans. 42 U.S.C. §§ 1437n(a)(3)(A) (270a), 1437n(a)(3)(B) (270a).

In July 1994, HUD issued regulations permitting housing authorities to select up to one half of all new admissions through "local preferences" fashioned by housing authorities to meet their local needs, with the other half selected through "federal preferences" prescribed by Congress. 59 Fed. Reg. 36616 *et seq.* (July 18, 1994) (274a-76a). Since 1994, HUD's regulations have explicitly endorsed a preference for working families. 24 C.F.R. §§ 960.205(a) (272a), 960.206(b)(2) (272-73a). Responding to a legal services organization that disapproved of the preference, HUD stated: "The Department is convinced that housing agencies must have the flexibility to give preference to working families to assure diversity in the residency of projects and to include families who can serve as role models for other families." 59 Fed. Reg. 36618 (July 18, 1994) (274a).

Congress has also emphasized that "[i]t is the policy of the United States . . . to vest in public housing agencies that perform well, the maximum amount of responsibility and flexibility in program administration, with appropriate accountability . . . ." 42 U.S.C. § 1437(a)(1)(C) (269a).

2. NYCHA's Operations

NYCHA is a public corporation charged with providing safe, decent, and sanitary housing to low-income residents in New York City. N.Y. Pub. Hous. L. §§ 401-02. NYCHA is widely regarded as the most successful housing authority in the nation and, therefore, is vested by

Congress with maximum responsibility and flexibility in program administration. NYCHA operates over 300 public housing developments. The 14 developments subject to the injunction barring the WFP are home to approximately 8,000 families.

3. The Decree

Although it had several defenses to the *Davis* complaint, NYCHA determined that a negotiated settlement would be the best course to pursue. Plaintiffs and the United States, which had brought an action that was consolidated with plaintiffs' action, similarly deemed it best to settle the actions by entering into the Decree.

The Decree, approved by the District Court in 1992, noted that NYCHA denied the material allegations in both complaints and that the Decree "shall not constitute an adjudication or admission by [NYCHA] of any violations of any law . . . ." (188a; *see* 223a ¶ 51) In its memorandum of law in support of the Decree, NYCHA acknowledged that, during a period when federal policy attempted to maintain racial integration by stemming the steady decline of whites, it had engaged in certain practices that, while fostering community support for new developments, also may have discriminated against Black and Hispanic applicants. In its memorandum in support of the Decree, the United States noted that these practices "caused certain buildings to be inhabited by a disproportionate number of whites. The Consent Decree simply attempts to remedy this discrimination by offering victims a chance to move into the buildings from which they were formerly excluded." In addition to the remedial relief afforded individuals who could show they had expressed interest in particular developments, the Decree also provided general injunctive relief.

i. General Injunctive Relief

The General Injunctive Relief section of the Decree forbids certain practices, including the use of any racial quota system. (194a ¶ 4f; 198a ¶ 7a)

The Decree specifically permitted NYCHA to "seek to achieve a tenant body in each Project composed of families with a broad range of incomes, generally representative of the range of incomes and rent-paying abilities of lower income families in its geographic operating area to the extent permitted under" federal law. (198a-99a ¶ 8)

The injunctive relief also included the adoption of the TSAP, designed to prevent any unlawful discrimination by specifying uniform practices, and to achieve an income mix of tenants at each NYCHA development. (195a-99a ¶¶ 5-9; 230a-64a) The Decree required that the TSAP remain in effect for five years. (197a ¶ 6c)

The TSAP contains a section on outreach plans that permit a housing project that does not have sufficient applications for apartment vacancies to borrow applications from a nearby project. (260a) According to what has become known as the Borrowing Provision, however, if the borrowing project's resident body is more than 30% white, it shall not borrow applications from another project with a tenant body more than 30% white. *Id.* None of the parties mentioned the Borrowing Provision in their presentations seeking Court approval of the Decree, and the District Court did not refer to it. In its brief in support of the Decree, the United States made a passing reference to the section of the Decree in which the Borrowing Provision appears, stating in full, "Finally, Section VIII of the TSAP (pp. 28-32) provides for programs for obtaining applicants for projects that have run out of applications for certain types of apart-

ments." The Second Circuit made the Borrowing Provision the basis for a permanent injunction against the WFP.

ii. Remedial Relief

NYCHA also agreed to provide up to 1,990 public housing units at 31 specified developments (defined in the Decree as "Affected Developments") to Black and Hispanic claimants who could show that they were interested in placement at those developments during 1985 through 1990. (189a ¶ 1b; 199a ¶ 10; 229a) HUD agreed to provide 200 Section 8 vouchers for rental assistance in private dwellings to other claimants who were interviewed by NYCHA between 1983-84. (199a-00a ¶ 11) While plaintiffs had alleged discrimination dating back three decades, they explicitly compromised for relief covering 1983 through May 1991 (*see* 195a ¶ 4j), commenting that other families who may have been injured before 1983 "are free to commence a new action on their own behalf."

Three out of every four vacancies at the Affected Developments were to go to the *Davis* claimants (208a ¶ 24), but, as the United States explained in its memorandum in support of the Decree, this remedial relief was " not a direction . . . 'to increase the number of minorities in public housing.' " Plaintiffs and the United States explicitly agreed that setting aside a specific number of apartments at the Affected Developments for qualified minority applicants would adequately redress any past discrimination. In their declaration in support of the Decree, the *Davis* plaintiffs acknowledged that:

> The parties devoted enormous effort and attention to the tasks of specifying the Affected Developments and identifying the number of apartments at each Affected Development that were denied to

> Black and Hispanic families by the practices challenged in these cases. The result of this intensive effort appears in Exhibit A to the Decree. Exhibit A represents the parties' agreement on the number of units that should be set aside to correct for the effects of past discrimination.

The United States confirmed that:

> The precise number of apartments arrived at, 1990, was the result of arduous negotiations. [ ] Obviously, in arriving at that number, both sides made concessions based on their perceptions of the weight of the evidence of discrimination and the risks of litigation. Nonetheless, it is intended as a fair approximation of the number of apartments that would have been available to blacks and Hispanics had they been told about the availability of the Affected Developments.

With the exception of the permanent injunctive provisions, the Decree dissolved on July 1, 2001, eight years and six months after it was entered. (223a ¶ 50)

4. The TSAP's Failure to Meet Income-Mix Goals

The TSAP set an income-mix goal for each development of 25% Tier III families (the highest income-eligible families, making between 50% and 80% of area median income); 37.5% Tier II families (making between 30% and 50% of area median income); and 37.5% of Tier I families (making below 30% of area median income). (258a-59a) The TSAP never approached these goals.

Instead, largely because of NYCHA's commitment to house homeless families, it has experienced a dramatic increase in the percentage of new admissions from Tier

I families, the lowest income group. For example, in 1995, Tier 1 applicants accounted for a staggering 77.6% of new admissions, while the TSAP yielded a mere 6.4% Tier III rentals and only 15.6% Tier II rentals. *Davis IX*, 278 F.3d at 69 (9a).

In addition, NYCHA's core of working families, a prime reason for its past success, is seriously eroding. Ten years ago, nearly half the families in NYCHA's developments worked. Today, fewer than one third have an employed person.

5. NYCHA's WFP

To meet the TSAP's income-mix goals, NYCHA proposed to adopt the WFP. Under the WFP, NYCHA allocated its "local-preference" rentals (up to 50% of all rentals) so that first priority goes to Tier III families; second priority to Tier II families; and last priority to Tier I working families. Within the "federal-preference" rentals, NYCHA gave fourth priority to working families who also qualify for one of three federal preferences.[1]

6. The District Court's Preliminary Injunction

Despite their concession that the WFP will meet the parties' income-mix goals far better than the TSAP while still over-representing the lowest income group, the *Davis* plaintiffs moved to enjoin the WFP on the ground that it would have a disparate impact on minorities because, according to their statistical expert, Leonard Cupingood ("Cupingood"), it would raise the

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[1] In 1996, Congress eliminated "federal preferences"; all preferences are now "local." Pub. L. No. 104-99, § 402(d)(1), 110 Stat. 2641 (1996) (267a). NYCHA, however, still allocates 50% of its rentals to working families, while the other 50% remain allocated to the former "federal-preference" categories, now called "need-based" families.

annual admission of white families from 4.2% of all rentals to 9.9%. Plaintiffs further argued that the WFP would adversely affect desegregation at 11 developments with tenant populations more than 50% white.

The District Court acknowledged that "unless a higher proportion of applicants with higher incomes receive rentals, the stability of the projects will be jeopardized." *Davis II*, 1997 U.S. Dist. LEXIS 10451, *11 (145a). It rejected plaintiffs' disparate-impact argument, citing the "essentially undisputed" facts that implementation of the WFP would cause the percentages of White, African American, Puerto Rican, and "other" families receiving rentals to more closely match the applicant pool, and the impact on non-Puerto Rican Hispanic families would not be statistically significant. *Davis II*, 1997 U.S. Dist. LEXIS 10451, *12, 13, 21, 31 (146a, 152a, 158a). The District Court, however, credited Cupingood's conclusion that the WFP would impede desegregation at the 11 majority-white developments, and enjoined the WFP at all of NYCHA's 322 developments. *Davis II*, 1997 U.S. Dist. LEXIS 10451, *34-42, 55 (160a-65a, 173a). Relying on the Borrowing Provision, the District Court also noted that "[u]nder the TSAP, a project is considered disproportionately white if more than 30% of its families are white." *Davis II*, 1997 U.S. Dist. LEXIS 10451, *35 (160a-61a).

The District Court denied NYCHA's motion for reconsideration or reargument, but limited the injunction to those developments more than 30% white. *Davis III*, 1997 U.S. Dist. LEXIS 18111, *10-14 (131a-34a), *as amended*, *Davis IV* (135a-36a). NYCHA timely appealed to the Second Circuit, which had jurisdiction under 28 U.S.C. § 1292(a)(1).

7. The Second Circuit's Vacatur and Remand

After noting "the importance of the issue and the importance of NYCHA's interest in the viability of its system," the Second Circuit agreed with NYCHA that Cupingood's analysis was so vague and conclusory as to preclude meaningful review and that the District Court had applied the wrong legal standard. *Davis V*, 166 F.3d at 436, 437 (117a, 119a-21a, 122a). Instead of determining whether the proposed use of the WFP would "*significantly* perpetuate segregation," the injunction had issued on the theory that "a step backwards, however small, in desegregating the projects at issue" is impermissible. *Compare Davis V*, 166 F.3d at 438 (122a) *with Davis III*, 1997 U.S. Dist. LEXIS 18111, *10 (131a). The Second Circuit vacated the District Court's decisions but left the preliminary injunction intact pending further review on remand. *Davis V*, 166 F.3d at 438 (122a).

8. The District Court's Permanent Injunction

On remand, the District Court maintained that developments over 30% white are segregated (*Davis VI*, 60 F. Supp. 2d at 231-32 (88a-90a)), even though the New York City-wide pool of families who are income-eligible for public housing is 38.4% white. Senior developments with white populations over 30% are deemed segregated even though white representation in the applicant pool for senior developments exceeds 35%.

Plaintiffs conceded that white representation will continue to decline at all but one of the Developments under both the WFP and the TSAP and that Cupingood's original projection that the WFP would produce an annual white admission rate of 9.9% may have been too high. Cupingood submitted projections five years to decades into the future on the difference in white move-in rates

at the Developments under the TSAP and with the WFP. He conceded that there had not yet been a statistically significant difference in white move-ins under the two systems, but opined that the difference would become statistically significant years or decades in the future if certain assumptions, concerning subjects about which he has no expertise, prove accurate.

NYCHA's statistical expert, David. W. Peterson ("Peterson"), responded that Cupingood's projections were meaningless because they impermissibly assumed that variables like project selection proportions, applicant pool composition, and move-in and move-out rates remain constant forever, while experience shows they change from year to year. Peterson explained that Cupingood's projections do not demonstrate a statistically significant difference in white move-in rates; instead they presume there will continue to be a difference in white move-in rates and demonstrate only that at some point in the future this difference will eventually become apparent. Peterson dismissed this exercise as meaningless on the ground that any difference compounded far enough over time will eventually become statistically significant.

Plaintiffs conceded and the District Court ruled that any disparity between the WFP and the TSAP cannot be considered meaningful unless, as a preliminary matter, it is statistically significant. *Davis VI*, 60 F. Supp. 2d at 240 (107a). The District Court nevertheless concluded that the WFP would significantly perpetuate segregation at developments more than 30% white and permanently barred its implementation there. *Davis VI*, 60 F. Supp. 2d at 239-41 (104a-09a). NYCHA timely appealed again to the Second Circuit, which had jurisdiction under 28 U.S.C. § 1291.

9. The Second Remand to Supplement the Record

The Second Circuit remanded to the District Court for a second time to supplement the record on, among other things, how many months it is expected to take each Development to achieve a white occupancy rate below 30% under the old TSAP and with the WFP. *Davis VII*, 2000 U.S. App. LEXIS 2746, *3 (63a-66a).

The District Court, relying on plaintiffs' assertions, found that: two Developments would have already reached white occupancy levels below 30% after completion of *Davis* remedial relief under the TSAP or the WFP; four Developments would reach 30% within the same year under either system, while at a fifth the difference would be five years under the TSAP and seven years under the WFP; two Developments would never reach 30% white occupancy levels under either system; three Developments would not reach 30% white for the next half century regardless of whether NYCHA used the TSAP or the WFP; five Developments, including three senior developments with applicant pools over 35% white, would become 30% white within 12 and 30 years under the TSAP, but never reach this level under the WFP; and three Developments would become 30% white within 14 to approximately 20 years with the WFP as compared to seven to approximately 15 years under the TSAP. *Davis VIII*, 103 F. Supp. 2d at 231 (57a-58a).

10. The Second Circuit's Decision

In the majority decision, the Second Circuit recognized that " 'a court cannot randomly expand or contract the terms agreed upon in a consent decree,' " but opined that " 'judicial discretion in flexing its supervisory and enforcement muscles is broad.' " *Davis IX*, 278 F.3d at 80 (30a). It then found, based on the Borrowing Provision, the "litigation surrounding [the Decree]," and

certain school desegregation cases, that a 30% white occupancy level was the proper measure of segregation at all NYCHA developments, even those not listed in the Decree as Affected Developments where discriminatory practices had allegedly occurred. *Davis IX*, 278 F.3d at 80-82 (30a-35a).

The Second Circuit did not find the difference in white admissions under the TSAP and the WFP statistically significant. Indeed, the majority dispensed with the statistical-significance requirement, stating that "the present inquiry falls outside the realm in which ordinary statistical analysis, and the need for inquiry into significance from a purely statistical standpoint, are needed." *Davis IX*, 278 F.3d at 83 (36a).

The injunction against the WFP was lifted at six of the Developments where the majority found that the WFP would not delay the reduction of the white population to 30% at all or by more than 12 months. *Davis IX*, 278 F.3d at 86, 88 (44a, 46a). The majority affirmed the injunction at the 14 remaining Developments on the ground that the difference in white population decline under the TSAP and the WFP was legally significant. *Davis IX*, 278 F.3d at 87-88 (44a-46a).

In his dissent, Chief Judge Walker expressed "concern[ ] that the majority . . . has endorsed a questionable attempt at social engineering and, in doing so, has reached a decision that may well have the practical effect of making several of the housing projects in New York City worse." *Davis IX*, 278 F.3d at 88 (47a). He rejected as "counter-intuitive" the "notion that . . . a project with more than 30% white-occupied apartments is 'predominantly white,' " and opined that the majority had selected 30% without regard to the differences in developments. *Davis IX*, 278 F.3d at 89 (49a).

Although the Decree prohibits unlawful discrimination on the basis of race, Chief Judge Walker concluded that "the practical effect of the majority's decision is to deny housing to people who deserve it because of their hard work or other merit solely on the basis of their race or ancestry, to frustrate the worthwhile efforts of the NYCHA to reward and promote employment and economic self-sufficiency in its tenants, and to deny the existing tenants the obvious benefit of having working families as their neighbors." *Davis IX*, 278 F.3d at 89-90 (50a). And although the Decree explicitly prohibits racial quotas, Chief Judge Walker found that "under the district court's and the majority's holdings, the 30% figure . . . effectively becomes a quota which, should the NYCHA fail to meet it with sufficient dispatch, penalizes a housing project by denying to it the WFP." *Davis IX*, 278 F.3d at 89 (50a).

REASONS FOR GRANTING THE WRIT

The Second Circuit set a racial quota for public housing residents to bar an admission preference for working families which is endorsed by the federal government and essential to the stability of NYCHA's housing program. The Second Circuit's decision thwarts federal policy, violates this Court's "four corners" rule for interpreting consent decrees, implements a racial quota never subjected to the strict-scrutiny analysis required by this Court for affording race-conscious relief, and undermines the amicable resolution of disputes.

Congress found that the public interest is served by a national housing program that rewards residents for employment and economic self-sufficiency, includes families with a broad range of incomes, and vests housing authorities with maximum responsibility and flexi-

bility. HUD, the Executive agency charged with overseeing public housing, explicitly endorses preferences for working families to promote financial and social stability. And all agree that NYCHA's program will be jeopardized without more working families. The Second Circuit's decision frustrates federal policy by barring the WFP in favor of a quota that, according to the dissent, "seems to have been picked out of thin air."

The majority created the quota by transforming a Decree that afforded remedial relief to individuals and required NYCHA to obey the Fair Housing Act into a desegregation plan. The Decree provided apartments for individuals allegedly denied an opportunity to reside at certain housing developments, but did not label any development "segregated" or require the white population to decline. Indeed, the Decree explicitly prohibited racial quotas. Nevertheless, the Second Circuit found that the WFP would perpetuate segregation at developments more than 30% white. Thus, the Second Circuit violated the four corners rule by imposing a racial quota inconsistent with the terms of the Decree. Under the four corners rule, the fact that the Decree includes explicit income-mix goals, but no racial-mix goals, confirms that the parties were fully capable of memorializing their agreements and did not agree to set racial mix goals.

Similarly, in proceedings to obtain judicial approval of the Decree, the parties and the District Court also made no mention of a race-based quota. Had the parties agreed to such a quota, the District Court would have been required to subject it to strict scrutiny before approving the Decree. The fact that the District Court never did a strict-scrutiny analysis confirms that the Decree does not impose a racial quota. A racial quota would not have survived strict scrutiny because there was no finding that

the Developments were segregated and, therefore, no compelling state interest to desegregate them. A 30% cap on whites would also have been invalid because it is not narrowly tailored. For example, even without the WFP, plaintiffs themselves project that a 30% cap on whites would never be reached at some developments and would take decades to reach at others.

Thus, the Second Circuit's transformation of the Decree indefinitely, and in some instances permanently, prevents NYCHA from implementing any salutary changes to its tenant admission procedures without the threat of federal court intervention. This result is especially draconian because the Second Circuit's decision is based on speculative projections, from data it recognized were statistically insignificant. If federal courts are permitted to limit the discretion of local government entities in ways never contemplated in a consent decree, those entities will be reluctant to resolve disputes amicably. The very predictability that a consent decree is designed to ensure will be undermined.

This Court should issue the writ to clarify that, while federal courts can supervise and enforce consent decrees, they are not free to disavow or expand their terms. The Court should also issue the writ to clarify that beneficial policies of local government are not to be held hostage to race-based quotas, absent particularized findings that the quotas are required to remedy past unlawful discrimination.

I.

THE SECOND CIRCUIT IMPERMISSIBLY INTRUDED ON LOCAL GOVERNMENT AUTHORITY BY MISCONSTRUING THE DECREE, WHICH BARS RACIAL QUOTAS AND DOES NOT REQUIRE DESEGREGATION, TO ENJOIN A CONGRESSIONALLY-ENDORSED POLICY AT DEVELOPMENTS WITH RESIDENT POPULATIONS MORE THAN 30% WHITE.

The Second Circuit violated this Court's four-corners rule for interpreting consent decrees by transforming a Decree that specifically prohibits race-based quotas into one that mandates such a quota. It compounded this error by imposing a quota that can never be attained at some Developments and may be reached at others only decades from now, despite an explicit provision in the Decree that remedial relief would end after eight and a half years. Thus, for the indefinite future, NYCHA is prohibited from implementing the race-neutral WFP to promote the economic diversity which Congress, the courts, and plaintiffs themselves all agree is critical to public housing. The *Davis* decision not only jeopardizes numerous public housing developments in New York City, but also undermines the national policy favoring amicable resolution of civil-rights suits.

A. The Second Circuit Violated this Court's Four-Corners Rule for Interpreting Consent Decrees by Defining Developments More than 30% White as Segregated.

As this Court instructed in *United States v. Armour & Co.*, 402 U.S. 673 (1971), the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the

parties to it or to how it might have been written had the plaintiff established his factual claims and legal theories in litigation. *Id.* at 681-82. Instead, because the defendant has waived his right under the Due Process Clause to litigate the issues raised by entering into the decree, the conditions upon which he has given that waiver must be respected. *Id.* at 682.

In this case, the lower Courts violated *Armour* by reaching beyond the Decree to define developments more than 30% white as segregated. The District Court fashioned 30% as a measure of segregation by implication, stating that it is "a negotiated figure that *implies* that the parties and the Court believed that a project was disproportionately white if more than 30% of its families are white." *Davis VI*, 60 F. Supp. 2d at 2332 (89a) (emphasis added). The Second Circuit approved the District Court's finding, which it characterized as "'[drawn] directly from the Consent Decree *and the litigation surrounding it*." *Davis IX*, 278 F.3d at 80 (30a) (emphasis added).

This 30% cap on white families cannot pass muster under *Armour* because it is inconsistent with the Decree's prohibition against NYCHA's use of racial quotas. *Armour*, 402 U.S. at 680 (rejecting argument that consent decree's purpose was to separate meatpackers from retail food business where "the decree leaves gaps inconsistent with so complete a separation . . . ."). The Decree specifically provides, for example, that, "[i]n adopting and implementing the TSAP . . . , the Housing Authority agrees that . . . it will use no racial quota systems, or other practice, technique or device to house Applicants in particular projects, buildings, or apartments, or to otherwise limit the availability of housing, on account of race, color, or national origin." (198a ¶ 7a; *see* 194a ¶ 4f) Yet, as the dissent recognized, the "30%

figure . . . effectively becomes a quota" and "the practical effect of the majority's decision is to deny housing to people who deserve it because of their hard work or other merit solely on the basis of their race or ancestry . . . ." *Davis IX*, 278 F.3d at 89 (50a).

A 30% cap on white representation is also inconsistent with the remedial relief specified in the Decree. Seven of the developments at which apartments were set aside for *Davis* claimants already had white populations below 30% when the parties identified them as Affected Developments in the Decree. Conversely, four developments with white incumbencies above 30% at the time the Decree was executed were not deemed Affected Developments. At no Affected Development do the remedial apartment set-asides detailed in the Decree reduce the white incumbency below 30%.

Under *Armour*, the fact that the Decree contains an explicit plan for income-mix goals, but not for racial-mix goals, confirms that it cannot be read to include racial-mix goals. *See Armour*, 402 U.S. at 679-80 (finding injunction did not run against shareholders' successors and assigns where parties did not use language to that effect but, in another context, "were able to use the words 'successors and assigns' when they wanted to."). The Decree specifically authorizes NYCHA to "seek to achieve a tenant body in each Project composed of families with a broad range of incomes . . . ." (198a-99a ¶8) In the TSAP, the parties specified that NYCHA would pursue income-mix goals of 25% from the highest income tier and 37.5% from each of the two lower-income tiers. (258a-59a) If the parties had agreed that developments with tenant bodies more than 30% white were segregated, they could simply have written the Decree to require all developments to be less than 30% white, and explicitly included in the Decree a remedial plan designed to achieve that goal.

Instead, as the District Court noted, "[t]he sole reference to the 30% figure is contained in the [Borrowing Provision of the] TSAP, incorporated by reference in the Consent Decree." *Davis VI*, 60 F. Supp. 2d at 231 (88a). Certainly, if the parties had agreed that developments would be deemed segregated until their white populations fell below 30%, a process that will never occur at some developments and may not occur at others for decades, they would not have buried that agreement in the back of the TSAP, which the Decree required to remain in effect for only five years. (197a ¶ 6c)

The Borrowing Provision appears in a minor administrative mechanism known as NYCHA's Project Outreach Plan, which permits a development that has no applicants on its waiting list for certain size apartments to borrow a small number of applicants from a neighboring project's waiting list to fill existing vacancies until the normal applications process has replenished its waiting list. The Borrowing Provision merely states that "if the borrowing project's tenant body is more than 30% white, OCD [the Occupancy Control Division of the Housing Applications Department] shall not select a project whose tenant body is also more than 30% white." (260a) As the Second Circuit noted, the Borrowing Provision does "treat[ ] 30% as the significant level" (*Davis IX*, 278 F.3d at 80 (31a)), but it does so only for the purpose of determining when one development cannot borrow applications from another. The Borrowing Provision does not define developments more than 30% white as "segregated," set racial-mix goals, or require that the white population decline to 30%.

The Second Circuit relies on three desegregation cases to buttress its conclusion that 30% white is a measure of segregation in this case. *Davis IX*, 278 F.3d at 81 (32-33a). In those cases, unlike here, however, the local gov-

ernment was found liable for causing segregation and explicitly ordered to remedy it. *See Brown v. Board of Education*, 892 F.2d 851 (10th Cir. 1989) (assessing impact of school board desegregation plan on schools previously operating under system of *de jure* segregation), *vacated and remanded*, 503 U.S. 978 (1992), *reinstated*, 978 F.2d 585 (10th Cir. 1992), *and cert. denied*, 509 U.S. 903 (1993); *United States v. Yonkers Bd. of Education*, 837 F.2d 1181, 1183-84 (2d Cir. 1987) (following lengthy trial, city held liable for racial segregation in housing, and city and school board held liable for racial segregation in public schools and ordered to remedy segregation), *cert. denied*, 486 U.S. 1055 (1988); *Penick v. Columbus Board of Education*, 583 F.2d 787, 799 (6th Cir. 1978), *aff'd*, 443 U.S. 449, 452, 453 (1979) (following 36-day trial, District Court found racial segregation in school system that " 'directly resulted from [the Board's] intentional segregative acts and omissions,' " and, "order[ed] the submission of a systemwide desegregation plan.").

Here, there was no finding of segregation and no desegregation plan. Instead, remedial relief was provided in the form of apartment set-asides, and the parties agreed that the apartment set-asides adequately corrected for the effects of alleged past discrimination. Although the Second Circuit opines that "NYCHA's own records plainly show segregative housing patterns" (*Davis IX*, 278 F.3d at 81 (33a)), there has been no showing that unlawful discrimination, as opposed to legitimate factors, caused the patterns the Second Circuit deems segregative 10 years after entry of the Decree. This Court requires such a causal connection. *See Board of Education v. Dowell*, 498 U.S. 237, 250 n.2 (1991) (directing lower courts to consider whether "present residential segregation in Oklahoma City was the result of private

decisionmaking and economics, and . . . too attenuated to be a vestige of former school segregation.").

Because the WFP does not have a disparate impact on minorities and cannot perpetuate segregation at Developments never found to be segregated, the Second Circuit had no basis to limit the broad authority vested in NYCHA by Congress or to frustrate Congressional policy requiring economic diversity in public housing. Indeed, as the First Circuit recognized, even where, unlike the WFP, a Congressional policy has a disparate racial impact, it is not "the courts' job to 'balance' objectives, with individual judges deciding which seem to them more worthy." *Langlois v. Abington Hous. Auth.*, 207 F.3d 43, 51 (1st Cir. 2000).

B. The Absence of the Strict-Scrutiny Analysis Required by this Court Demonstrates that the Decree Did Not Impose a Racial Quota.

Under this Court's strict-scrutiny standard of review, governmental action based on race must further a compelling state interest and be narrowly tailored to further that interest. *See Adarand Constructors v. Pena*, 515 U.S. 200, 227 (1995); *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989); *Wygant v. Jackson Bd. of Education*, 476 U.S. 267, 279-80 (1986). "Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Croson*, 488 U.S. at 493.

The Borrowing Provision from which the 30% white quota has been gleaned in this case has never been strictly scrutinized. The parties and the District Court did not even mention it during the fairness hearing or in

the decision approving the Decree. Their silence highlights that the Borrowing Provision was never intended to set 30% as a racial quota. *Cf. Durrett v. Housing Authority of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (before approving settlement, court must ensure, among other things, "that the proposed decree will not violate the Constitution, a statute, or other authority . . . ."). Indeed, the Borrowing Provision cannot properly be described as providing race-conscious relief at all. It bars a development more than 30% white from borrowing applications of both whites and non-whites from another development more than 30% white.

If the Borrowing Provision had been intended to set a quota or afford other race-conscious relief, the District Court would have subjected it to strict scrutiny, and found it invalid. There has been no showing that a 30% quota on whites at the Developments is necessary to further a compelling state interest. Instead, the Decree negotiated by the parties and approved by the Court actually forbids racial quotas. (194a ¶ 14f; 198a ¶ 7a) Moreover, there was no finding of segregation and thus no compelling state interest in remedying segregation. While the Decree afforded remedial relief in the form of apartment set-asides to individuals who may have been subjected to discriminatory practices, there was no finding that those practices caused segregation which would endure beyond completion of remedial relief.

Even if there were segregation to be remedied, the 30% quota is not narrowly tailored because there was no consideration given as to "whether lawful alternative and less restrictive means could have been used." *Wygant*, 476 U.S. at 280 n.6 (citations omitted).

Moreover, because some Developments are not projected to become 30% white until decades from now and others are never projected to do so, the 30% quota

endures forever, despite this Court's admonition that federal court supervision of local government operations is a "temporary measure to remedy past discrimination" and "not intended to operate in perpetuity." *Dowell*, 498 U.S. at 237-38. Unlike this case where there has been no finding of segregation and no desegregation plan, *Dowell* involved a desegregation plan to remedy *de jure* segregation in a school system. Nevertheless, this Court still refused to sanction "judicial tutelage for the indefinite future," stating that "[n]either the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result." *Id.* at 249.

Finally, the 30% quota is not narrowly tailored because it applies to developments that were not included as Affected Developments where plaintiffs alleged discriminatory practices had occurred. It also encompasses senior developments, whose populations should not be limited to 30% white because their applicant pool exceeds 35% white. And it ignores that white representation in the New York City-wide pool of individuals income-eligible for public housing exceeds 38%.

Under these circumstances, the dissent properly noted that "[t]he 30% number seems to have been picked out of thin air," queried "Why not 25% or 35% or 40%? Why not a different number for different projects?", and concluded that "the 30% figure amounts to an arbitrary number that is being used to frustrate the considered policy of the NYCHA." *Davis IX*, 278 F.3d at 89 (49a-50a).

C. The Second Circuit's Decision Frustrates the National Policy Favoring Settlements.

Because amicable resolutions ease judicial dockets and often result in more workable relief than Court-imposed relief, there is a national policy in favor of settling litigation. In particular, as the United States noted in its memorandum in support of entry of the Decree here, " 'national policy' under the Fair Housing Act 'strongly favors settlement . . . .' " *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980). A district court's discretion in determining whether a voluntary settlement should be approved, has been described as "restrained by 'the clear policy in favor of encouraging settlements,' especially in broad-based public housing disputes." *Durrett*, 896 F.2d at 604.

The Second Circuit has undermined this policy by transforming the Decree into a desegregation plan that indefinitely, and in some cases, permanently prohibits NYCHA from implementing indisputably beneficial policies. If a Decree with specific remedial relief and an explicit sunset clause can be interpreted to require a permanent injunction barring a change in policy that is accepted as legitimate by all, and explicitly endorsed by the federal government, defendants everywhere will be reluctant to resolve class-wide discrimination claims through negotiation, for fear that agreements could be recast so as to limit their discretion in uncontemplated ways. The result will be costly and time-consuming litigation, with the courts having to resolve all issues.

II.

THE SECOND CIRCUIT'S RULING THAT THE WFP PERPETUATES SEGREGATION CONFLICTS WITH ESTABLISHED LAW BECAUSE IT IS BASED ON SPECULATIVE PROJECTIONS FROM DATA THAT LACK STATISTICAL SIGNIFICANCE.

The Second Circuit enjoined the WFP as perpetuating segregation based on Cupingood's speculative and unsupported assumptions about future events without a demonstration of statistical significance between the TSAP and the WFP. That ruling conflicts with established law.

Courts have repeatedly recognized that to establish discrimination, "causation must be proved; that is, the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants . . . because of their membership in a protected group" and that "statistical disparities must be sufficiently substantial that they raise such an inference of causation." *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 998-99 (1988); *Russell v. Enter. Rent-A-Car Co.*, 160 F. Supp. 2d 239, 259 (D. R.I. 2001); *Graffam v. Scott Paper Co.*, 870 F. Supp. 389, 398 (D. Me. 1994), *aff'd*, 60 F.3d 809 (1st Cir. 1995).

Not all disparities are probative of discrimination. *Ottaviani v. State University of New York*, 875 F.2d 365 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990). Before a statistical analysis can demonstrate causation, it must be deemed statistically significant. "Statistical significance is a measure of the probability that a disparity is simply due to chance, rather than any other

identifiable factor." *Ottaviani*, 875 F.2d 365 at 371. Only when the probability that a disparity is due to chance sinks to a certain threshold level, can statisticians infer that the deviation is attributable to a particular cause, not mere chance. *Id.*

According to Cupingood, if the observed data recur indefinitely, the disparity in white admissions under the TSAP and the WFP will become statistically significant in five years or, in some instances, decades into the future. This assertion is a stark admission that the differences in the observed data are not themselves statistically significant. Because the purpose of measuring statistical significance is to determine if a disparity is caused by a particular factor (here, the WFP), or whether it could be attributed to chance, the assumption that the data will repeat itself from year to year is a classic example of assuming a conclusion. Only if the data did repeat itself for at least five years could Cupingood confidently assert that the disparity is statistically significant.

Although the Second Circuit implicitly recognized that Cupingood did not establish statistical significance, it held, contrary to the positions of plaintiffs and the District Court, that statistical significance was not necessary. *Compare Davis IX*, 278 F.3d at 83 (36a) *with Davis VI*, 60 F. Supp. 2d at 240 (107a). The Second Circuit explained that the "need for predictions . . . was inescapable" and the District Court was free to credit Cupingood's assumptions about future events. *Davis IX*, 278 F.3d at 83 (36a). Cupingood, however, is no expert on whether members of various racial groups are likely to make decisions in the same proportions from year to year, or on what the racial breakdown of persons eligible for the WFP will be in five, 10, or 50 years. Even if he possessed expertise in such matters, Cupingood would have to provide evidence to support his assumptions

before the Court could ascribe them any probative value. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 598 (1993) (A trial judge has "the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand."). Accordingly, the lower Courts' finding that the WFP perpetuates segregation rests on nothing more than unsupported and speculative assumptions. That is hardly an adequate basis to enjoin a salutary policy endorsed by the federal government.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted:

Steven J. Rappaport
Counsel of Record
Ricardo Elias Morales
General Counsel
New York City Housing Authority
250 Broadway, 9th Floor
New York, New York 10007
(212) 776-5152

Counsel for Petitioner

Of Counsel:

Nancy M. Harnett

New York, New York
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